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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1930.

No. 74

THE UNITED STATES OF AMERICA,
Petitioner,

versus

ANTHONY LA FRANCA.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

BRIEF FOR ANTHONY LA FRANCA.

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OPINIONS BELOW.

The opinion of the District Court *(R. 7)* is reported in *26 F. (2d) 706*, and that of the Circuit Court of Appeals *(R. 28)* in *37 F. (2d) 269*.

STATUTES INVOLVED.

Section 35, Title II, of the National Prohibition Act, c. 85, 41 Stat. 305, 317 *(U. S. C., Title 27, Sec. 52)* which provides:

> "All provisions of law that are inconsistent with this Act are repealed only to the extent of such

inconsistency and the regulations herein provided for the manufacture or traffic in intoxicating liquor shall be construed as in addition to existing laws. This Act shall not relieve anyone from paying any taxes or other charges imposed upon the manufacture or traffic in such liquor. No liquor revenue stamps or tax receipts for any illegal manufacture or sale shall be issued in advance, but upon evidence of such illegal manufacture or sale a tax shall be assessed against, and collected from, the person responsible for such illegal manufacture or sale in double the amount now provided by law, with an additional penalty of $500 on retail dealers and $1,000 on manufacturers. The payment of such tax or penalty shall give no right to engage in the manufacture or sale of such liquor, or relieve anyone from criminal liability, nor shall this Act relieve any person from any liability, civil or criminal, heretofore or hereafter incurred under existing laws."

Section 5 of the Willis-Campbell Act, c. 134, 42 Stat. 222, 223 *(U. S. C., Title 27, Sec. 3)*, which provides:

"That all laws in regard to the manufacture and taxation of and traffic in intoxicating liquor, and all penalties for violations of such laws that were in force when the National Prohibition Act was enacted, shall be and continue in force, as to both beverage and nonbeverage liquor, except such provisions of such laws as are directly in conflict with any provision of the National Prohibition Act or of this Act; but if any act is a violation of any of such laws and also of the National Prohibition Act or of this Act, a conviction for such act or offense under one shall be a bar to prosecution therefor under the other. All taxes and tax penalties

provided for in section 35 of Title II of the National Prohibition Act shall be assessed and collected in the same manner and by the same procedure as other taxes on the manufacture of or traffic in liquor."

Section 701, Paragraph 9, of the Revenue Act of 1924, c. 234, 43 Stat. 253, 327 *(U. S. C., Title 26, Sec. 206)*, which provides:

"Every person carrying on the business of a brewer, distiller, wholesale liquor dealer, retail liquor dealer, wholesale dealer in malt liquor, retail dealer in malt liquor, or manufacturer of stills, as defined in section 3244 as amended and section 3247 of the Revised Statutes, in any State, Territory, or District of the United States contrary to the laws of such State, Territory, or District, or in any place therein in which carrying on such business is prohibited by local or municipal law, shall pay, in addition to all other taxes, special or otherwise, imposed by existing law or by this Act, $1,000. The payment of the tax imposed by this subdivision shall not be held to exempt any person from any penalty or punishment provided for by the laws of any State, Territory, or District for carrying on such business in such State, Territory, or District, or in any manner to authorize the commencement or continuance of such business contrary to the laws of such State, Territory, or District, or in places prohibited by local or municipal law.

The taxes imposed by this section shall, in the case of persons upon whom a corresponding tax is imposed by section 1001 of the Revenue Act of 1921, be in lieu of such tax."

Section 29, Title II of the National Prohibition Act, c. 85, 41 Stat. 316 *(U. S. C. Title 27, Sec. 46)* which provides:

> "Any person who manufactures or sells liquor in violation of this chapter shall for a first offense be fined not more than $1,000 or imprisoned not exceeding six months, and for a second or subsequent offense shall be fined not less than $200 nor more than $2,000 and be imprisoned not less than one month nor more than five years.
>
> Any person violating the provisions of any permit, or who makes any false record, report, or affidavit required by this chapter, or violates any of the provisions of this chapter, for which offense a special penalty is not prescribed, shall be fined for a first offense not more than $500; for a second offense not less than $100 nor more than $1000, or be imprisoned not more than ninety days; for any subsequent offense he shall be fined not less than $500 and be imprisoned not less than three months nor more than two years. It shall be the duty of the prosecuting officer to ascertain whether the defendant has been previously convicted and to plead the prior conviction in the affidavit, information, or indictment. The penalties provided in this chapter against the manufacture of liquor without a permit shall not apply to a person for manufacturing nonintoxicating cider and fruit juices exclusively for use in his home, but such cider and fruit juices shall not be sold or delivered except to persons having permits to manufacture vinegar."

STATEMENT.

The case has been correctly stated by the United States in its brief. *(Brief of the United States 5-7).* In order to avoid repetition, we, accordingly, adopt the Government's statement.

Questions Presented:

(1) Whether a suit for alleged taxes derived from Sec. 3244 Revised Statutes, Sec. 701, Paragraph 9 of the Revenue Act of 1924, and doubled and **assessed** under Sec. 35, Title II of the National Prohibition Act, is one for taxes or penalties.

(2) If the suit is one for penalties and not for taxes, whether recovery is barred, because of the defendant's previous conviction under the National Prohibition Act for the same act or acts, by virtue of Sec. 5 of the Willis-Campbell Act.

(3) If the suit is one for penalties and not for taxes, whether recovery is barred, because of the defendant's previous conviction under the National Prohibition Act for the same act or acts, by virtue of the Fifth Amendment of the Constitution prohibiting double jeopardy.

(4) If the suit is one for penalties and not for taxes, whether recovery of a penalty assessed under Sec. 35 of the National Prohibition Act and based upon Section 701, paragraph 9 of the Revenue Act of 1924, is barred because of a claimed unconstitutional result by virtue of the Tenth Amendment of the Constitution.

ARGUMENT.

I.

The suit is one for penalties and not taxes.

It is of first importance to determine whether this suit is for taxes or for penalties. For, confessedly, if it be determined that this is a suit for a **pure tax,** then the remaining points raised by us are of no avail, as we would be submerged by the jurisprudence of this Court. *(U. S. v. One Ford Coupe, 272 U. S. 321, 326).*

But, the suit is not for taxes. *Lipke v. Lederer, 259 U. S. 557; Regal Drug Co. v. Wardell, 260 U. S. 386; Dukich v. Blair, 3 Fed. (2nd) 302, 270 U. S. 670; Jasper v. Hellmich, 4 Fed. (2nd) 852; Coffey v. Noel, 11 Fed. (2nd) 399.*

The amount sought to be recovered is $2,042.18 *(R. 5).* This sum is made up of several items. These items will be discussed in order.

One item of the total alleged to be due is for $4.68. This amount is characterized in the petition as a penalty provided for by Sec. 3176 of the Revised Statutes, because the defendant *(being a retail liquor dealer)* failed to file a return. That this item is a penalty for not complying with the law is not open to argument.

Likewise recovery sought of the penal sum of $500 for being a retail liquor dealer in violation of Sec. 35 of the National Prohibition Act, means that such recovery is based on punishment for law violation.

The other two items sought to be recovered are the sum of $37.50 retail liquor dealer's tax under Sec. 3244 of the Revised Statutes assessed and doubled under Sec. 35 of the National Prohibition Act and $1500 *(nine months' special tax for being a retail liquor dealer in violation of the law of Louisiana as provided for by Section 701, paragraph 9 of the Revenue Act of 1924)*, and assessed and doubled under Sec. 35 of the National Prohibition Act.

It is our claim that suit for recovery of the above items assessed and doubled by Sec. 35 of the National Prohibition Act is one for **penalties** and not taxes. And we claim further that the matter is not open to argument, having been definitely concluded by *Lipke v. Lederer*, and *Regal Drug Co. v. Wardell, supra.*

In *Lipke v. Lederer* the suit was for an injunction to restrain the collection by distraint of an assessment made under Section 35 of the National Prohibition Act. The injunction was granted and upheld by this Court because the Government was seeking the collection of penalties and not taxes. In determining that the assessment was a penalty and not a tax, the opinion said *(pp. 561-562)*:

> "The mere use of the word 'tax' in an act primarily designed to define and suppress crime is not enough to show that within the true intendment of the term a tax was laid. Child Labor tax case, 259 U. S. 20. When by its very nature the imposition is a penalty it must be so regarded. Helwig v. U. S., 188 U. S. 605. Evidence of crime Section 29 is essential to assessment under Section 35. It lacks all the ordinary characteristics of a tax whose primary function 'is to provide for the support of the

> Government', and clearly involves the idea of punishment for infraction of the law, the definite function of a penalty."
>
> *O'Sullivan v. Felix, 233 U. S. 318.*

Regal Drug Co. v. Wardell was a similar case to that of *Lipke v. Lederer.* This Court merely affirmed the law as laid down in *Lipke v. Lederer*, viz: That where a tax is assessed and doubled under Section 35 of the National Prohibition Act, an act primarily designed to suppress crime, such assessment loses all characteristics of a tax, and becomes a penalty or punishment for violation of law.

The Court will note that recovery is sought here of the same kind of penalties under Sec. 35 of the National Prohibition Act as were assessed in *Lipke v. Lederer, supra*, and *Regal Drug Co. v. Wardell, supra.*

The subsequent case of *United States v. One Ford Coupe (272 U. S. 321)*, did not alter or in any way change the law laid down by the Court in *Lipke v. Lederer* and *Regal Drug Co. v. Wardell.* In fact, the opinion cites *Lipke v. Lederer* with approval and distinguishes it from the case decided. (See *U. S. v. One Ford Coupe, 272 U. S., at page 328).*

In the *One Ford Coupe* case, the court merely reaffirmed what it had held in *United States v. Yuginovich, 256 U. S. 450*, and kindred cases, namely, that the Government may tax what it prohibits. We have no dispute with this jurisprudence. The *Ford Coupe* case was a forfeiture

proceeding under Section 3450 of Revised Statutes, the forfeiture of the automobile being sought because the Government was defrauded of the tax on the liquor. The Court held that the tax as laid and assessed under the internal revenue laws was a true tax.

But the situation here is different. The assessments here were not made under any internal revenue laws, but under a law primarily designed to suppress crime, viz: Sec. 35 of National Prohibition Act, and are in truth **penalties** incurred by law violation and not taxes. *Lipke v. Lederer, supra; Child Labor Tax Case, 259 U. S. 20.*

II.

The suit being for the recovery of penalties, it is barred by the Section 5 of Willis-Campbell Act.

The defendant, La Franca, has plead guilty and has been punished for the acts or offenses which the government attempts to punish him for in this suit. The conviction of the defendant is pleaded in the petition. *(R. 3, 4).*

The Circuit Court of Appeals held that the limitations of Section 5 of the Willis-Campbell Act, barring prosecution under the Internal Revenue Laws and under the National Prohibition Act where there was a former conviction under one or the other would apply to the case at bar. *(R. 28-30).*

This opinion speaks for itself. We, therefore, devote our argument to the other points of law raised below and not covered by the Court's opinion.

III.

The suit being for the recovery of penalties, and the defendant having already been punished by fine and imprisonment for the same act or offense, it is barred by the Fifth Amendment of the Constitution prohibiting double jeopardy.

It is of no moment, whether this Court agrees with the reasoning of the Court below in finding for the defendant. The decree is correct. Because if the action is not barred by Section 5 of the Willis-Campbell Act, it is barred by the Constitution, *(viz: The Fifth Amendment thereof)* prohibiting double jeopardy.

But it is said by the United States in its brief that, although we assigned as error on appeal the overruling of this plea, *(R. 24)* that because the record doesn't show that a bill of exception was taken to the overruling of the said plea, it is not now available to us.

This contention is without merit. The plea of former jeopardy in this case was practically in the form of a general demurrer, inasmuch as the Government had plead in its petition the conviction of the defendant for the same act or acts for which it is now trying to again punish him. *(See R. pages 3-4, Petition paragraph 14).* It was not necessary to take evidence to substantiate the facts alleged in the plea when those facts were admittedly part of the Government's pleadings. Hence, when the plea was overruled an exception was unnecessary as all facts or questions bearing on the plea were contained on the face of the pleadings. See *Nalle v. Oyster, 230 U. S. 165;*

Denver v. Holmes Savings Bank, 236 U. S. 101; Mound Coal Co. v. Jeffrey Mfg. Co., 233 Fed. 956 (C. C. A. 4).

Rosen v. U. S. (C. C. A. 2), 271 Fed. 651, and *Feinberg v. U. S. (C. C. A. 8), 2 Fed. (2nd) 955*, cited by the Government are inapposite.

Although the Fifth Amendment of the Constitution prohibiting double jeopardy has been given a very broad and liberal construction by this Court *(Ex parte Lange, 18 Wall 168; U. S. v. Chouteau, 102 U. S. 603)*, let us see whether the plea of former jeopardy here, meets the original test of practice. Defendant here, as shown by the record, was prosecuted criminally and convicted for the same acts for which the United States is now attempting to recover these penalties. The parties are the same, the acts on which recovery is sought are the same, and also the fact that jeopardy attached to the defendant at the time of his plea of guilty, leaving only for this Court to decide whether or not this action is one in which former jeopardy can be sustained.

The above statement is not altogether admitted by the Government. For it contends that the offense which was committed is not the same. However, an examination of Sec. 35 of the National Prohibition Act, under which recovery of the penalties are sought, discloses that "* * * but upon evidence of such illegal manufacture or sale a *tax* shall be assessed against, and collected from, the person responsible * * *". *(Word in italics ours)*. So that the only evidence required to recover the penalty according to the very terms of Sec. 35 of this Act, is proof of the unlawful sale or sales for which the defendant had

already been punished. It is conceded that a person in the doing of a criminal act may commit more than one offense or offend the laws of more than one sovereign, or several laws of the same sovereign. To this effect are the holdings, in *Hebert v. Louisiana, 272 U. S. 312*, and *Albrecht v. U. S., 273 U. S. 1.* But these cases do not decide that where a person has committed one offense and has been prosecuted and convicted, that he can be again proceeded against for the same offense and be punished by use of the same and identical evidence and no more.

It is also contended by the Government that it was compelled to prove that La Franca was a retail liquor dealer, in addition to the proof of the unlawful sale of the liquor. But the contention is erroneous because the statute *(Sec. 35 National Prohibition Act)* requires only evidence of the **illegal sale** as a condition precedent to the assessment of the punishment. Accordingly, *Ledbetter v. U. S., 170 U. S. 607, 610*, relied on in Government's brief *(P. 32)* is without application.

Having thus established that the parties are the same, that the evidence used is identical and that the act of the defendant is the same, it is in accordance with the Fifth Amendment of the Constitution and with the jurisprudence of this Court, that the plea of former jeopardy should be sustained.

One of the early leading cases on the question of former jeopardy that amply covers the situation here is that of *U. S. v. Chouteau, 102 U. S. 603 (26 L. Ed. 246).* In that case the United States filed suit on a distiller's bond against the principal and sureties thereof for penal-

ties alleged to have been incurred because of the distiller's violation of the bond. It appeared that two indictments had been found against the distiller, one of which contained counts for the specific offenses which constituted the whole ground and cause of the present action. Under the authority of an act of Congress, a compromise with the Government was effected by which a specific sum was paid by the distiller in full settlement of said indictments and prosecutions, and said indictments were accordingly dismissed and abandoned. The question presented to the Court was whether sureties on a distiller's bond should be subjected to a penalty attached to the commission of an offense when the principal has effected a full and complete compromise with the Government, under sanction of an act of Congress, of prosecutions based upon the **same offense.**

Mr. Justice Field delivered the opinion of the Court and in holding that former jeopardy will apply said:

> "Admitting that the penalty may be recovered in a civil action, as well as by a criminal prosecution, it is still as a punishment for the infraction of the law. The term penalty involves the idea of punishment, and its character is not changed by the mode in which it is inflicted, whether by a civil action or a criminal prosecution. The compromise pleaded must operate for the protection of the distiller against subsequent proceedings as fully as a former conviction or acquittal. He has been punished in the amount paid upon the settlement for the offense with which he was charged, and that should end the present action, according to the principle on which a former acquittal or conviction may be invoked to protect against a second punishment for the same offense. To hold otherwise would be to sacrifice a great principle to the

mere form of procedure, and to render settlements with the Government delusive and useless.

"Whilst there has been no conviction or judgment in the criminal proceedings against the distiller here, the compromise must on principle have same effect. The Government through its appropriate officers has indicated, under the authority of an Act of Congress, the punishment with which it will be satisfied. The offending party has responded to the indication and satisfied the Government. It would, therefore, be at variance with right and justice to exact in a new form of action the same penalty. For, as it was justly said by this Court, in Ex parte Lange, speaking through Mr. Justice Miller, 'If there is anything settled in the jurisprudence of England and America, it is that no man can be twice lawfully punished for the same offense. And, though there has been nice questions in the application of this rule to cases in which the act charged was such as to come within the definition of more than one statutory offense, or to bring the party within the jurisdiction of more than one court, there has never been any doubt of its entire and complete protection of the party where a second punishment is proposed in the same court, on the same facts, for the same statutory offense. The principle finds expression in more than one form in the maxims of the common law.'" *(18 Wall. 168 [85 U. S. XXI, 876]).*

In the case of *U. S. v. McKee (Federal cases 15,688)*, the defendant had been convicted and punished under a section of the Revised Statutes for conspiring with certain distillers to defraud the United States by unlawfully removing distilled spirits without payment of the taxes thereon. He was afterwards sued in a civil action by the United States under another section, to recover a penalty of double the amount of the taxes lost by the con-

spiracy and fraud. The Court held that the two alleged transactions were but **one,** and the suit for the **penalty** was barred by the judgment in the criminal case. The decision was put on the ground that the defendant could not be twice punished for the same crime, and that the former conviction and judgment were a bar to the suit for the penalty.

It is our claim that the *McKee* case is identical in principle with the case at bar. This case has been cited and quoted from with approval by this Court in *Coffey v. U. S., 116 U. S. 445.*

Another case upholding the principle we are endeavoring to maintain here is *United States v. Gates (Federal cases No. 15,191).* The defendant in that case was indicted and convicted, under Act of August 30th, 1842, for smuggling and clandestinely introducing into the United States certain goods with intent to defraud the revenue of the Government, and was sentenced by fine and imprisonment. Thereafter, a civil suit was filed against Gates by the Government, to recover the penalty imposed by statute, for landing the same goods without a permit. The defendant pleaded in bar, the conviction, sentence and punishment aforesaid, and the Court held that by general principles of law, the Government having once punished the defendant was prohibited from prosecuting him again for acts constituting the same offense.

The case of *Murphy v. United States, 272 U. S. 630,* may be likened to the case here by analogy. In that case the defendant had been acquitted of maintaining a liquor nuisance on their premises in violation of Section 21 of the National Prohibition Act, and their place was sub-

sequently proceeded against under the provisions of Section 22 *in rem*, with a view to closing the same for one year as a result of the same violation of law for which they were acquitted. They plead former jeopardy, and the Court in denying their plea said that it could be denied only upon the theory that a proceeding under Section 22 of the National Prohibition Act was not a punishment and that if it were a punishment the plea of former jeopardy would have to be sustained.

The Government contends that the constitutional limitation on the right to proceed twice against the same person for the same offense, is of no avail if Congress designates the penalties to be imposed as cumulative as distinguished from alternative.

This contention is based upon a false premise, because it is assuming that the penalties assessed in Section 35 of the National Prohibition Act are cumulative with the penalties provided for in Sec. 29 of the Act, under which the defendant has already been punished. But there is no language contained in Section 35 or in other parts of the Act or of the Willis Campbell Act to warrant such a conclusion. On the contrary, Section 29 of the Act clearly sets forth the punishments which are to be inflicted. For the pertinent part of Section 29 reads:

> "Any person who manufactures or sells liquor in violation of this chapter shall for a first offense be fined not more than $1000, or imprisoned not exceeding six months * * *."

This is indicative that Congress when enacting this section intended that the penalties of fine and imprisonment should be alternative for first offenders.

There is no language in Section 35 that evidences an intention on the part of Congress to make the penalties therein assessed, cumulative with the penalties contained in Section 29.

Section 35 was evidently intended to and does cover cases of violation of regulations as defined in Sec. 1 whereby a party holding a permit to engage in the manufacture and sale of intoxicating liquors under specified conditions conformable to the Eighteenth Amendment and the National Prohibition Act and who has paid a tax under Internal Revenue Statutes, has violated these conditions, and regulations resulting in an illegal manufacture or sale. *Noscuntur a sociis.* The interpretation contended for by us is manifested by the letter and spirit of Sec. 35, and rejects the idea of an additional penalty on conviction of an illegal manufacture and sale of intoxicating liquors fully covered by Sec. 29 disassociated from those regulations and conditions governing the traffic in intoxicating liquors. In short, a license or permit to engage in a lawful business does not authorize an illegal act under the guise of such a permit.

The Willis Campbell Act afterwards passed, reenacted the former internal revenue laws, taxes and penalties. It is unreasonable to assume as the Government contends that because Congress reenacted all the statutes in force prior to the Eighteenth Amendment, that it intended that all the penalties thereunder should be cumulative and

in addition to the penalties provided for in the National Prohibition Act. It is submitted that a sound interpretation is, that Congress in reenacting the former internal revenue laws intended to discourage illicit liquor enterprises by taxation, by the larger penalties provided for under certain sections of the Revised Statutes, and by giving the enforcement officers more laws to work with.

But this law manifests no intention to cumulate penalty upon penalty, because it will be remembered that Section 5 of this Act says:

> "* * * but if *any act* is a violation of any of such laws and also of the National Prohibition Act or of this Act, a conviction for such *act* or offense under one shall be a bar to prosecution therefor under the other." (Words in italics ours).

This limitation is nothing more than an expression of legislative intention to curtail proceedings for additional or subsequent punishment after conviction.

We therefore submit that unless the statute in plain and unmistakable terms sets forth that the penalties therein are cumulative, a former conviction plead against the subsequent prosecution for the same act or offense will bar the second proceeding. *United States v. Wiltberger, 5 Wheat. 76, 95.*

Hence, it follows that the cases cited by the Government on this point have no application. For these were all cases where the statute in unmistakable terms provided for cumulative punishment.

The case of *In re. Leszynsky, Fed. Cas. No. 8279*, relied on by the Government, is a colorful illustration of a statute providing for cumulative penalties. The statute, Sec. 3318, Revised Statutes, specified a penalty of $100 in addition to imprisonment and fine. The opinion distinguishes the case from that of *United States v. McKee* and *United States v. Gates, supra*, relied on by us.

United States v. Mt. Clemens Beverage Co. (E. D. Mich.) 23 Fed. (2nd) 885; United States v. Bullinger (E. D. N. Y.) 290 Fed. 395, relied on by the Government are at variance with the law laid down by this Court in *United States v. Chouteau, supra.*

The case of *Graham v. West Virginia, 224 U. S. 616*, also relied on by the United States is without application to the case at bar. In that case additional punishment was imposed on a defendant upon a showing that he was a second offender. It was not a case of producing the same evidence to convict for the same offense. But additional evidence, that of former conviction was necessary to give the Court the right to mete out the additional punishment.

IV.

Assessments made and doubled under Section 35 of the National Prohibition Act, based on Paragraph 9, Section 701 of the Revenue Act of 1924, produces an unconstitutional use of the latter statute, in violation of the Tenth Amendment of the Constitution.

This point is raised by us, only in the alternative and affects the largest penalty sought to be recovered by the United States.

The petition claims a penalty of $1500 from the defendant *(See R. 3, petition par. 11)* derived and based on paragraph 9 Section 701 of the Revenue Act of 1924 and assessed and doubled under section 35 Title II of the National Prohibition Act.

The pertinent part of the basic statute reads as follows:

> "Every person carrying on the business of a brewer, distiller, wholesale liquor dealer, retail liquor dealer, * * * as defined in Section 3244, as amended and section 3247 of the Revised Statutes, in any State, Territory or District of the United States, contrary to the laws of such State, Territory, or District, * * * shall pay in addition to all other taxes special or otherwise imposed by existing law or by this Act, $1,000.00." *(From par. 9, Sec. 701 of the Act of 1924).*

This statute undoubtedly lays a tax, and an assessment under its provisions would be valid. But the Government doesn't assess under the provisions of this act. Instead it doubles the tax and assesses it under the provisions of Sec. 35, Title II of the National Prohibition Act. By this process, it transforms the tax into a **penalty** by virtue of *Lipke v. Lederer, supra,* and *Regal Drug Co. v. Wardell, supra.*

Hence the result is that the Government is attempting to penalize this defendant for violating the law of the State of Louisiana.

We challenge the right of the United States to punish a person for violating a State law. This Govern-

ment is one of the delegated powers, and all power not delegated to the United States by the Constitution is reserved to the several states. There is no power vested in the Federal system authorizing Congress to penalize a person for violating a State law and it never was the intention of Congress that Sec. 701 of the Revenue Act of 1924 could or would be used in such a manner so as to bring about an unconstitutional result.

The power granted to the Government by the Eighteenth Amendment did not give the right to impinge upon the plenary power of the States to punish violations of their own laws. For Section 2 of the Amendment reads:

> "The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation."

The United States was given concurrent power with the several States to enforce prohibition. No plenary power that was vested in the sovereign State prior to the Amendment was taken away. It merely delegated the power to Congress co-extensively with the several States to prohibit the traffic in intoxicating liquors. See *U. S. v. Lanza, 260 U. S. 377.*

The powers of Congress and the several States respecting the enforcement of the Eighteenth Amendment has been fully discussed by this Court in the case of *Hebert v. Louisiana, 272 U. S. 312.* In that case Hebert was indicted in the United States Court for violation of the National Prohibition Act. While the indictment in the United States Court was pending, he was arrested and charged in the Louisiana State Court for the same offense.

Hebert challenged the right of the State Court to proceed against him under the State law, and cited Sec. 256 of the Federal Judicial Code to substantiate his plea. The Court, in denying him relief under the State law, said:

> "The Eighteenth Amendment contemplated that the manufacture of intoxicating liquor for beverage purposes may be denounced, as a criminal offense, both by the federal law and by the State law, and that these laws may not only co-exist but be given full operation independently of each other. * * *"
>
> *(U. S. v. Lanza, supra).*

This opinion not only recognizes the concurrent powers of the United States and the State of Louisiana to deal with the prohibition of intoxicating liquors, but also recognizes that the powers of each sovereign are **exclusive** as to the punishment of the crime for violating the law of that particular sovereign.

For it is said:

> "The provision in Section 256 of the Federal Judicial Code has no bearing on the authority of a State Court to entertain an accusation for an offense against the State law. That provision relates to offenses 'cognizable under the authority of the United States.' *Only offenses against the laws of the United States are cognizable under its authority. Those against State laws are cognizable only under the authority of the State. And this is true where the same acts are an offense against both a law of the United States and a law of the State.*" (Words in italics ours).

In order to sustain the validity of the result sought to be obtained here, the Government has claimed that this

statute *(Sec. 701 of the Revenue Act of 1924)* is analogous to the Reed Bone Dry Amendment, and the Webb Kenyon Law *(39 Stat. at L. 699)*. This attempted analogy is unsound, and is distinguishable from the statute here. The Reed Amendment and the Webb Kenyon law were statutes passed by Congress under the interstate commerce clause of the Constitution prohibiting generally the transportation, etc., of liquor to or from States which had enacted local prohibition statutes.

The leading case upholding the constitutionality of this type of statute is that of *James Clark Distilling Co. v. Western Maryland R. Co., 242 U. S. 315.* The attack made on the Webb Kenyon law was, not that it violated the Tenth Amendment, but was that it was not a uniform law and was further violative of the Fifth Amendment. The opinion holds that inasmuch as Congress had under its general power to regulate interstate commerce the right to prohibit the interstate transportation of liquor from one State to another, irrespective of whether the State or States were dry by local legislation or not, that merely because Congress saw fit to exercise a lesser power in making the transportation, etc., of intoxicating liquor unlawful into States which had local prohibition laws, did not make the law void for want of uniformity or violate the Fifth Amendment regarding due process of law.

The situation under the foregoing acts have no analogy to the case at bar. Under those acts, Congress

made it a crime to ship liquor into a dry state or territory. The gravamen of the offense in a case under such a statute is not the violation of the State law, but the **transportation in interstate** commerce into dry territory. Congress, by virtue of its power to regulate interstate commerce, could not punish the local law violation. No more than it could amend the Dyer Act *(prohibiting the transportation of stolen automobiles)* and declare that whoever should be guilty of stealing an automobile in violation of a state law should pay a penalty of $1000.00. The right of Congress to prohibit the transportation of stolen automobiles in interstate commerce, however, is unquestioned.

In the case at bar, Congress is attempting to penalize the violation of the law of another sovereign, a matter over which it has no jurisdiction or authority, while in the other statutes Congress is merely punishing, not the violation of a local law, but of its own law, under its power to regulate interstate commerce.

CONCLUSION.

The judgment of the Circuit Court of Appeals should be affirmed.

Respectfully submitted,

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January, 1931.

ADDENDA.

In addition to the points presented in our original brief, we desire to urge the following:

A general demurrer was filed to the petition, was overruled by the District Court and duly excepted to by respondent. (R. pp. 10, 11).

The question under this general demurrer is:

Whether the penalties provided for in *Sec. 35, Title II*, National Prohibition Act apply in every case of law violation or should be restricted to those cases where the person responsible has obtained liquor revenue stamps or tax receipts.

Sec. 35 provides: "All provisions of law that are inconsistent with this act are repealed only to the extent of such inconsistency and the regulations herein provided for the manufacture or traffic in intoxicating liquor shall be in addition to existing laws". The word "regulations" as used, refers to the regulations of the Commissioner of Internal Revenue. This word is so defined by *Section I, Title II* of the Act. The regulations, as being in addition to internal revenue laws, can only apply to non-beverage liquor (liquor used for medicinal purposes, etc.), inasmuch as the Constitution and the Prohibition Act forbid the manufacture or sale of beverage liquor.

The section proceeds: "This Act shall not relieve any one from paying any taxes or charges imposed upon the manufacture or traffic in such liquor". The words

"Such liquor" mean non-beverage liquor sold or manufactured under the regulations of the Commissioner above provided for. This sentence evidences the intention of Congress that persons who manufactured or sold liquor for non-beverage purposes under governmental regulations and permits would not be relieved from paying taxes on such liquor.

Continuing, it is provided that, "No liquor revenue stamps or tax receipts for any illegal manufacture or sale shall be issued in advance * * *". This manifests a prohibition against officers of the internal revenue bureau from issuing any revenue stamps or tax receipts to anyone manufacturing or selling liquor except where such person is a lawful dealer. And such lawful dealer is one who is doing business under Governmental regulations. In short, one who sells or manufactures non-beverage liquor. The sentence goes on "* * * but upon evidence of such illegal manufacture or sale a tax shall be assessed against, and collected from, the person responsible for such illegal manufacture or sale in double the amount now provided by law, with an additional penalty of $500.00 on retail dealers and $1000.00 on manufacturers". The words "such illegal manufacture or sale" show an intention to associate or connect the illegal manufacture or sale here with that in the beginning of the sentence, and evidences an intention to limit the assessment of the penalties imposed to cases where the person responsible has sold or manufactured liquor illegally *under the guise of Government stamps or tax receipts.*

We contend that the true intention expressed by Congress in the above sentence is as follows: that govern-

ment officers are prohibited from issuing stamps or tax receipts in advance for any law violation, but in the event any person has issued to them stamps or tax receipts and under the protection of the same commits a violation of law, then the so-called double taxes and penalties shall be imposed.

If we are right in the proposition advanced, the remaining sentence of *Sec. 35* can have no bearing on the case.

The petition does not allege that respondent sold liquor illegally after obtaining revenue stamps or tax receipts, and, therefore, under the construction of *Sec. 35* urged by us, he did not become liable for the penalties therein provided for.

The general demurrer should be maintained; otherwise, we rely on the points raised by us in the original brief.

Respectfully submitted,

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